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In the Supreme Court of the United States

OCTOBER TERM, 1998

SAMUEL N. MARROQUIN AND RACHEL V. MARROQUIN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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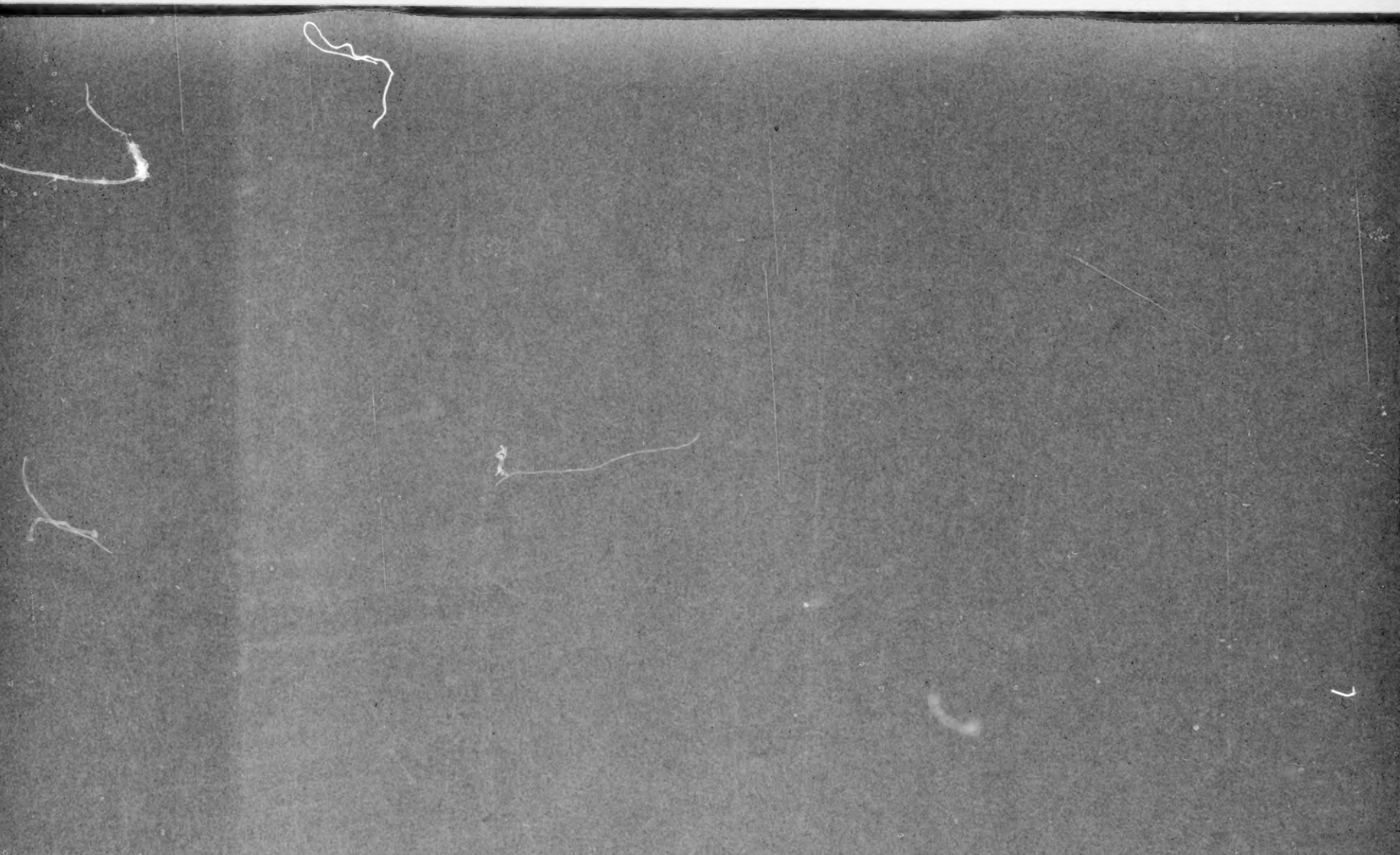

QUESTION PRESENTED

Whether petitioners' claim for refund was timely when it was filed more than six years after the date the taxes were paid.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10) and the opinion of the district court (Pet. App. 3-9) are both unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1998 (Pet. App. 10). The petition for rehearing was denied on July 21, 1998 (Pet. App. 11-12). The petition for a writ of certiorari was filed on October 19, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. Section 7422(a) of the Internal Revenue Code, 26 U.S.C. 7422(a), provides:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

2. Section 6511(a) of the Internal Revenue Code, 26 U.S.C. 6511(a), provides, in relevant part:

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

* * * * *

STATEMENT

1. Petitioners filed their 1982 income tax return on or about April 15, 1983. On that return, they reported a loss in the amount of $419,790 from their partnership interest in Owl Investments (Pet. App. 3-4). The loss incurred by Owl Investments stemmed from its investment in Hillcrest Government Securities, which was a

trading program that engaged in sham transactions that generated fictitious losses for investors (Pet. App. 3-4). See *Treaty Pines Investment Partnership* v. *Commissioner*, 967 F.2d 206, 207-208 & n.1 (5th Cir. 1992).

The Internal Revenue Service disallowed the losses generated by the Hillcrest transactions and asserted tax deficiencies against the Hillcrest investors. The Service also established a settlement program under which Hillcrest investors could settle their tax deficiencies by agreeing to a full disallowance of any loss resulting from Hillcrest transactions. On February 29, 1988, petitioners sent a letter to the Service in which they stated that they desired to participate in this settlement program (Pet. 4; Doc. 1, at 3; Doc. 22, at 7).

On November 17, 1988, however, petitioners informed the Service that they wanted instead to settle their tax obligations under the terms of a different settlement that was then being offered to partners in Owl Investments. The settlement that petitioners requested in November 1988 was more favorable to them than the settlement they requested in February 1988 because it permitted petitioners to deduct partnership losses in an amount equal to 133% of their cash investment in the partnership. On December 28, 1988, and March 23, 1989, petitioners remitted to the Service the amounts that they calculated were due under the terms of the more favorable settlement option (Doc. 21, at 18).[1]

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[1] In the meantime, in September 1988, petitioner Samuel N. Marroquin attempted to intervene in a Tax Court proceeding involving adjustments to the Owl Investments partnership tax return. Although every partner in a partnership is generally deemed to be a party to a suit challenging an adjustment of the partnership's tax return (26 U.S.C. 6226(c)), a partner who has

On February 27, 1989, the Service sent petitioners a letter that agreed to the settlement that petitioners requested in November 1988.[2] On March 21, 1989, petitioners executed a Closing Agreement that set forth the amount of their allowable Owl Investments loss for the 1982 tax year (Doc. 19, at 33). The Service executed that Closing Agreement on May 10, 1989. On June 12, 1989, the Service assessed a tax deficiency against petitioners in the amount reflected under the terms of the Closing Agreement (Doc. 21, at 17-18).

2. More than six years later, on June 25, 1995, petitioners filed a claim for a refund of the tax that they paid as a result of the settlement of their Owl Investments loss (Doc. 19, at 41-47). They claimed that they were entitled to a refund because the Service had not made a timely assessment of the tax under 26 U.S.C. 6229(f). That statute suspends the period for making an assessment of tax arising out of a partnership item for one year after the date the government "enters into a settlement agreement with the partner" (26 U.S.C. 6231(b)(1)(C), incorporated by reference in 26 U.S.C. 6229(f)). Petitioners asserted that, under this statute, the Service was required to make an assessment of tax within one year after February 29, 1988, the date on which they first requested participation in the original Hillcrest settlement program. They claimed that the

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entered into a settlement of his partnership items with the government is excluded from the suit (26 U.S.C. 6226(d)). The Internal Revenue Service notified the Tax Court in May 1990 that petitioner Samuel N. Marroquin had settled his Owl Investments partnership items. The Tax Court thereafter determined that he was not a proper party to the proceedings (Doc. 22, Exh. C).

[2] Under 26 U.S.C. 6224(c), the Service is required to allow all partners in a partnership to settle their liabilities on consistent terms if they make a timely request for such treatment.

assessment made on June 12, 1989, was therefore untimely and that the taxes paid in the absence of a timely assessment should be refunded.

Section 7422(a) of the Internal Revenue Code, in conjunction with 28 U.S.C. 1346(a)(1), requires, as a condition of the waiver of sovereign immunity for tax refund suits, that the taxpayer make a timely administrative refund claim. 26 U.S.C. 7422(a). To be timely, a refund claim must be filed by the later of (i) three years after the return was filed or (ii) two years after the tax was paid. 26 U.S.C. 6511(a). Petitioners, however, did not file a claim for refund within three years after they filed their 1982 income tax return (on or about April 15, 1983) nor within two years after the taxes at issue were paid. The Service therefore denied the administrative refund claim as untimely (Doc. 18, at 42).

3. Petitioners thereafter commenced this tax refund action in district court. On the government's motion, however, the district court dismissed the case because the refund claim was untimely (Pet. App. 3-9). The court rejected petitioner's contention that, if the assessment were untimely under 26 U.S.C. 6229(f)—because it was made more than one year after the settlement of the partnership issues had been proposed—the period for filing a timely refund claim would remain open. Petitioners' theory was that, if the assessment had been untimely, the remittances made by the taxpayer would not be treated as "payment[s]" of tax under *Thomas* v. *Mercantile National Bank*, 204 F.2d 943 (5th Cir. 1953), and *Ford* v. *United States*, 618 F.2d 357 (5th Cir. 1980), and would therefore not commence the two-years-after-payment period of 26 U.S.C. 6511(a). The district court, however, held that, even if the assessment were untimely for purposes of assessment, it was sufficient to commence the period for filing

a refund claim under 26 U.S.C. 6511(a) (Pet. App. 8). The court therefore dismissed the refund suit as untimely (*id.* at 9).

4. The court of appeals affirmed in a *per curiam* opinion, "for essentially the reasons given by the district court and other reasons given by the United States in its brief and during argument" (Pet. App. 10).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.[3]

1. In *Thomas* v. *Mercantile National Bank*, 204 F.2d 943 (1953), and *Ford* v. *United States*, 618 F.2d 357 (1980), the Fifth Circuit held that, for purposes of the limitations period for filing a tax refund claim, a remittance of tax does not become a "payment" until the tax is formally assessed by the IRS. Neither the Internal Revenue Service, nor the majority of the courts of appeals, agrees with that position. Most circuits do not attach definitive significance to the making of an assessment in determining whether there has been a payment of tax. Instead, they require a wider inquiry into the facts and circumstances surrounding a remittance in order to determine whether it was a "payment" of tax (instead of a "deposit") for purposes of 26 U.S.C. 6511(a). *Moran* v. *United States*, 63 F.3d 663, 666-668 (7th Cir. 1995)(discussing majority and minority

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[3] Petitioners' recitation of the facts contains numerous inaccuracies, especially concerning the nature of the parties' settlement negotiations. But, as the courts below properly held, petitioners' refund claim was untimely even under their version of the facts.

views).[4] This case is not a suitable vehicle for resolution of this conflict because, under any of the alternative interpretations of these provisions, petitioners cannot prevail in this case.

a. Under the majority view, it is plain that petitioners cannot prevail because, in making the remittance in connection with the final settlement of their tax liability in 1989, the circumstances plainly establish that petitioners were making a payment of the taxes that were then due. See page 3, *supra*. Indeed, that payment was a condition of the settlement. Since petitioners did not file an administrative claim for refund within two years from that date, their suit for refund is therefore barred under the majority rule.

b. As the Fifth Circuit itself held in this case, petitioners also cannot prevail under the minority rule adopted by that court (Pet. App. 10). As the court of appeals held, petitioners' "refund claim was untimely" even under the Fifth Circuit rule (*ibid.*) because an untimely assessment "cannot be construed as no assessment" and, at a minimum, would "trigger[] a taxpayer's right to file for a refund of his overpayment" (*id.* at 7-8 (quoting and relying on Rev. Rul. 74-580, 1974-2 C.B. 400)). See *id.* at 10 (adopting reasoning of district court). Thus, under the Fifth Circuit's own articulation of its minority rule in this very case, petitioners cannot prevail even under the minority rule.

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[4] In certain circumstances, involving withholding or estimated taxes, remittances are deemed to be tax payments as a matter of law as of the due date of the return (without regard to any extension of time). See *Ott* v. *United States*, 141 F.3d 1306 (9th Cir. 1998)(estimated taxes); *Ehle* v. *United States*, 720 F.2d 1096 (9th Cir. 1983)(withholding taxes).

c. Because resolution of the conflict among the circuits on the question presented would therefore not alter the ultimate disposition of the case, review by this Court is not warranted. This Court sits "to correct wrong judgments, not to revise opinions" (*Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945)).

2. Petitioners err in asserting (Pet. 11) that the decision in this case conflicts with the decision of this Court in *Rosenman* v. *United States*, 323 U.S. 653 (1945). Nothing in *Rosenman* suggests that the timeliness of an assessment has bearing on the running of the refund claim limitations period. In *Rosenman*, the taxpayer made a remittance of tax "under protest and duress" and solely to avoid the imposition of penalties and interest that would be due if the taxpayer did not make a timely payment of its tax. *Id.* at 659-660. The Service placed this amount in a non-interest bearing "suspense account" to the credit of the taxpayer. *Id.* at 660. The Court held that, on those particular facts, the remittance was made and accepted as a "deposit" and did not become a "payment" of tax (for purposes of the applicable statute of limitations) until the Service thereafter made an assessment of tax and applied the deposit against the taxpayer's liability. See *id.* at 661-663.[5]

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[5] In the *Thomas* case, the Fifth Circuit concluded that a "payment" occurs only when an assessment is made. In the *Ford* case, a panel of the Fifth Circuit reluctantly followed that rule despite its view (618 F.2d at 361) that the *Thomas* decision was "not justified by Supreme Court precedent, the practice of other courts, or the realities of our tax system." Neither of those cases addressed whether an untimely assessment would be sufficient to create a "payment" for purposes of the statute of limitations; that issue was addressed in this case as a matter of first impression in the Fifth Circuit. The decision in the present case thus plainly does not, as

In the present case, unlike in *Rosenman*, there was no express or implied agreement for the funds to be held as a "deposit" rather than be applied as a payment. To the contrary, the facts of this case reflect that the remittance was made and accepted as a payment of tax. See Pet. App. 4.

3. Moreover, even though the government erred by stipulating to the contrary in district court, the assessment made in this case in June of 1989 was timely in any event. Petitioners disavowed the settlement that they requested on February 29, 1988, by requesting a more favorable settlement on November 17, 1988. See page 3, *supra*. As the government explained in its brief in the court of appeals, the one-year period of 26 U.S.C. 6229(f) thus did not commence to run on February 29, 1988, as petitioners claimed, but rather began on May 10, 1989, when the government "enter[ed] into a settlement agreement with the partner" (26 U.S.C. 6231(b)(1)(C), incorporated in 26 U.S.C. 6229(f)). Because the assessment was made within one year of that date, it was timely under Section 6229(f).

Petitioners assert (Pet. 10) that, if the court of appeals relied on a determination that the assessment of tax in this case was timely, the court should have remanded for further proceedings because of the contrary stipulation in the district court. But the court of appeals did not rely on this rationale in affirming the district court. See Pet. App. 10. Because, in affirming, the court of appeals adopted the reasoning of the district court (*ibid.*), and the district court assumed that

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petitioners erroneously assert (Pet. 11), conflict with the decisions in *Thomas* and *Ford*. Even if such an intracircuit conflict existed, however, it would not be a suitable basis for review by this Court. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974).

the assessment was untimely, a remand for a determination of whether the assessment was timely is plainly unnecessary to the disposition of the case by either of the courts below. No purpose would thus be served by a remand for further proceedings.

4. Finally, petitioners assert (Pet. 10) that the court of appeals *might* have erred if it had adopted the government's argument that there was no jurisdiction in this tax refund suit for the recovery "of a cash bond" (*ibid.*). Petitioners claim that such a holding, if made, would result in a conflict with the decision in *New York Life Ins. Co.* v. *United States*, 118 F.3d 1553 (Fed. Cir. 1997), cert. denied, 118 S. Ct. 1559 (1998). The short answer to petitioners' assertion is that nothing in the decision in this case either in the district court or in the court of appeals-addresses or resolves the issue of jurisdiction over a suit for recovery of a cash bond such as was involved in *New York Life*. The decision in this case does not address the issue addressed in *New York Life* and therefore cannot be said to be in conflict with that decision.

In *New York Life*, the taxpayer made pre-assessment remittances to the government. When the taxpayer later sued to recover its remittances, the government contended that the suit was barred by the taxpayer's failure to file an administrative refund claim as required by 26 U.S.C. 7422(a). The Court of Federal Claims held that the refund claim procedures of 26 U.S.C. 7422(a) were inapplicable because the amount at issue was a deposit of funds with the government rather than a payment of tax. The United States asserted that there was no jurisdiction over that case because the tax refund provisions apply only to suits for a refund of taxes that have been paid and are not applicable to suits to recover a "deposit." The Federal Circuit held,

however, that jurisdiction for a suit against the United States to recover a deposit existed under the Tucker Act, 28 U.S.C. 1491. 118 F.3d at 1556.

The present case, by contrast to *New York Life*, was brought as a suit in district court for a "refund of income taxes and interest" under 28 U.S.C. 1340, 1346(a)(1). Jurisdiction over that tax refund claim was barred by petitioners' failure to file a timely refund claim (Pet. App. 10), and the decisions below neither address nor resolve the separate jurisdictional issue presented in *New York Life*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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